DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

,)
by his parent,)
,)
)
Petitioners,)
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vs.)
)
LATHROP R-II SCHOOL DISTRICT,)
)
Respondent.)

DECISION ON REMAND
COVER SHEETS

This is the decision of the hearing panel on remand from the United States District Court for the Western District of Missouri. The initial proceeding in this case was an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3 RSMo.

THE PARTIES

Student:

Petitioner: Father,

Respondent: LATHROP R-II SCHOOL DISTRICT.

The petitioner was represented by:

Stephen Walker
212 East State Road 73, Suite 122
Saratoga Springs, UT 84043

The school district was represented by:

Teri B. Goldman
Mickes Goldman, LLC
555 Maryville University Dr., Suite 240
St. Louis, MO 63141

HEARING OFFICERS:

Kenneth M. Chackes	Hearing Chair
Marilyn McClure	Panel Member selected by parents
Terry Allee	Panel Member selected by school district

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When the hearing panel originally decided this case we followed the law in the United States Court of Appeals for the Eighth Circuit, and placed the burden of proving compliance with the IDEA on the school district. "At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA." *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). Subsequent to our decision, however, the United States Supreme Court held that in an administrative hearing under the IDEA, "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer v. Weast*, 126 S. Ct. 528, 535 (2005). As a result, the United States District Court remanded this case to the hearing panel for

reconsideration of the decision in light of the Supreme Court's decision on the burden of proof. *Lathrop R-II School Dist. v.* , No. 05-6102-CV-SJ-GAF (W.D. Mo. 2007).

Accordingly, the panel has reconsidered those portions of the decision in which a majority ruled in favor of the parents. On the issues on which a majority of the panel ruled in favor of the school district, the error regarding burden of proof was harmless. *Sch. Bd of Indep. Sch. Dist. No. 11 v. Rennollet*, 440 F.3d 1007, 1010 (8th Cir. 2006). Consequently, those issues do not need to be reviewed and our original decision stands.

Portions of this decision on remand are the same as the original panel decision but are included so the reader has a single document to review to obtain an understanding of the panel's rationale. In making this decision the panel has had the benefit of the briefs submitted to the federal court by the parties, as well as the federal court decision remanding the case.

STATEMENT OF ISSUES

When the parents submitted their request for a due process hearing in this case they were not represented by an attorney. The parents filed an original and then an amended request for hearing. Ex. R-42 at 548; Ex. R-43 at 570. The parents later retained an attorney who, on April 29, 2004, filed Petitioners' Clarification of Issues. Ex. R-44. In that document the parents stated the following issues:

(1) The District **failed to craft appropriately drafted IEPs** for the 2002-03 and 2003-04 school years and, **thus, denied the student a free appropriate public education** (FAPE), in that the IEPs lacked:

(a) sufficiently measurable annual goals and objectives;

(b) functional and meaningful objective or evaluative criteria; and

(c) adequate related and support services, including an adequate behavior plan.

(2) The District failed to provide the parents adequate **prior written notice** for the 2002-03 and 2003-04 school years in violation of 20 U.S.C. § 1415(b) and 34 C.F.R. § 300.503.

(3) The District failed to provide **necessary services** for the 2002-03 and 2003-04 school years, and thus failed to provide a FAPE requiring the parents to obtain such services privately and at their own expense.

(4) The District failed to **address all the student's educational and social emotional needs**, and thus denied him a FAPE for the 2002-03 and 2003-04 school years.

(5) The District failed to **provide special education and related services designed to meet the individual educational, social and emotional needs** of the student for the 2002-03 and 2003-04 school years, and thus denied the student a FAPE.

The parents' attorney stated at the beginning of the hearing that the Clarification of Issues was intended to be a supplement to the original and amended requests for due process submitted by the parents. Tr. 19. In their original request the parents complained that the District **failed to provide needed OT and SLP services**. Their attorney stated they intended to pursue those issues and that they were part of issues 1 and 3 in their Clarification of Issues, pertaining to the 2002-03 and 2003-04 school years. Tr. 19-21. The parents also indicated at the start of the hearing that the previously alleged issue that the District **failed to provide the parent with all records** was part of the overall issue of whether the student was provided a FAPE. Tr. 22.

The parents' attorney also stated at the beginning of the hearing that the parents intended to pursue additional issues that were not specifically mentioned in the written submissions. Those issues included **lack of staff training**, as part of the issue of the District's failure to provide necessary services; **failure to keep the parents informed** and **violation of the parents' right to participate**, as part of the issues relating to the failure to appropriately draft IEPs and the failure to provide all records; and **failure to conduct an appropriate evaluation**, as part of the issue of failure to appropriately draft IEPs. Tr. 25. The district sought a ruling, on constitutional due process grounds, limiting the issues to those specifically raised by the parents in writing prior to the hearing. Tr. 11, 28-30, 33. The parents' attorney offered to agree to a continuance if the district sought one in order to be prepared to respond to all the issues. Tr. 32-33. The Chair pointed out that the IDEA regulations that deal with the parents' obligation to provide a notice of issues indicate that the State may not deny or delay a parent's right to a due process hearing for failure to provide proper notice. Tr. 34; 34 C.F.R. §300.507 (1999). The Chair also stated his view,

> that in order to balance the parent's right to a due process hearing and the school district's general constitutional right to fair notice and due process," that the proper procedure is to go forward with the hearing unless the school district wants more time to prepare and yet allow the school district more time to prepare a response so that the school district has a full opportunity to respond to the issues that come up during a hearing.

Tr. 34. The district's attorney responded that she was not seeking additional time, but that she believed that general constitutional due process limits the parents to the issues raised in advance

of the hearing, and that case law supports that view. Tr. 35. After hearing argument from the attorneys and following a private conference among the panel members, the Chair announced: "We have decided we are not dismissing any specific issues, but we'll limit the testimony and decision to the issues that were raised in the [parents'] written notices." Tr. 36. The Chair explained that the issues that were not specified in writing "would not result in specific findings of violation by themselves," but could be considered as they relate to the issues that were raised in writing. Tr. 36-37.

In the **parents' post-hearing brief**, they seek rulings on the following issues:

I. The District denied FAPE by excluding and limiting parent participation in the development of goals and objectives and in making placement decisions.

That issue was not specifically mentioned in the parents' written submissions prior to the hearing, but was raised in the parents' opening statement and asserted by their attorney to be related to the issue of the district's failure to craft appropriately drafted IEPs resulting in a denial of FAPE. The panel will consider the issue in that context, whether the district excluded and limited parent participation and thereby led to inappropriately drafted IEPs. The district could not have suffered any prejudice from the panel's consideration of that issue as it had ample time to prepare its case, even after the beginning of the hearing, and as evidenced by the fact that the district wrote a detailed response to that issue in its post-hearing submission. Dist. Brief at 95-98.

II. The IEPs were deficient, because they failed to:

A. Include a statement of present levels of educational performance or baseline data;

B. Include measurable goals and objectives;

C. Include appropriate objective criteria and evaluation procedures for determining progress;

D. Address the student's particular needs arising from his disability (in the area of behaviors);

E. Include sufficient information to make a placement decision.

All of those issues, except part E, were clearly raised in writing prior to the hearing.

III. Parents are entitled to reimbursement.

That issue was raised in writing prior to the hearing.

IV.A. The District failed to provide proper prior written notice.

That issue was raised in writing prior to the hearing.

IV.B. The District made decisions without including key people with knowledge, including the parents.

That issue relates to the first issue above, parent participation.

In their Clarification of Issues, the parents sought the following relief:

(1) A finding of a denial of FAPE for the 2002-03 and 2003-04 school years.

(2) Reimbursement for expenses, including independent evaluations, services the parents' provided, and education related costs for the 2002-03 and 2003-04 school years.

(3) A finding that petitioners are prevailing parties and are entitled to attorneys' fees.

(4) Compensatory education and services.

(5) Additional equitable relief required by the evidence.

FINDINGS OF FACT

1. The student in this case is a student with a disability for purposes of the IDEA and the Missouri State Plan for Part B of the IDEA. At all relevant times he was educationally diagnosed as autistic.

2. At the time of hearing, the student was a middle-schooled age male (DOB: February 23, 1991) who resided in and attended the district from October 2000 through May 2004.

3. Prior to the parents' move to Lathrop, Missouri, the student attended the Putnam County School District.

1. On or about November 15, 1999, the Putnam County School District reevaluated the student when he was in the third grade. Ex. P-4. The report noted that he had attended Putnam County for his entire school career and was placed on an IEP in 1994. Ex. P-4. On the Test of Non-Verbal Intelligence (TONI), the student achieved a below average IQ score of 84. Ex. P-4. On an adaptive behavior scale, he received a quotient of 56, nearly three standard deviations below the mean. Ex. P-4 at 18. On the Brigance Diagnostic Inventory of Basic Skills, the student obtained the following scores: Readiness – 1.6 grade level; reading – 4th grade level; language arts – 2.8 grade level; and math – 3rd grade level. Ex. P-4. The narrative section of the Brigance explained that, although the student knew his sight word vocabulary to the fourth grade level and read words comfortably at the third grade level, his comprehension was at only a pre-first grade level. Ex. P-4 at 19. Moreover, the report indicated that the student did not understand some directional terms, did not know all the body parts, did not button, zip or

tie his shoes, did not know his ordinal numbers, could not count by two's or add or subtract with renaming, and did not know the value of coins or comprehend measurement.[1] *Id.* at 19. Putnam County's speech-language evaluation showed that the student's speech was robotic in nature and his language skills were at only the 1% or three-year-old level. Ex. P-4 at 21. His speech also was echolalic and, at that time, the student did not relate appropriately to people, did not acknowledge his peers, and displayed inappropriate behaviors. *Id.* at 21-22. Putnam County educationally diagnosed the student as autistic. *Id.* at 23.

1. On or about October 18, 2000, the Putnam County District developed an IEP for the student.[2] Ex. P-6. The present level noted that the student could perform simple math functions using a calculator and could spell any word if he first saw it written. Ex. P-6. The present level also stated that the student could call words at the fourth grade level, but could not comprehend at that level. *Id.* The IEP noted the student engaged in disruptive behaviors. *Id.* In particular, Putnam County's IEP said the student "is very noisy and disruptive;" he does not want to do any work; he "needs a very structured one on one intensive program; "[h]e should not be in a regular classroom until behaviors are under control;" "he is destructive;" when an item is taken away "he disrupts the classroom by screaming and making noises;" he "controls much of his environment by noise;" and he will not participate in art. Ex. P-6 at 29. The front page of the IEP stated that the student will be placed 100% of the time in special education, but in

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1 At hearing, however, the parent testified that, at the time the family moved to Lathrop, the student could tell time, could add, subtract and perform multiplication problems in his head, could read fourth and fifth grade level books, and could read his father's college text books. Tr. 1294.

2 The parents misstated the record when they claimed they attended that IEP meeting. Parents' Brief at 9.

another place, the IEP indicated that he had always been placed in regular education with an aide. Ex. P-6.

2. On or about October 20, 2000, the student transferred and enrolled in the Lathrop School District. Ex. R-1 at 1, 2. Prior to that time, the student's father spoke to Special Education Director, Dr. Ken Quick, regarding the family's anticipated move to Lathrop. As a result and before the student enrolled, Quick and other staff members enrolled in Project Access training in autism to prepare for the student. Tr. 561, 577-78, 594, 1632, 2024-26. Staff received additional training in autism after the student's enrollment. Tr. 562, 1632, 2026-36.

3. The Lathrop District initially placed the student in an interim regular education fourth grade placement until a new IEP could be developed. Tr. 96, 1223, 1636-38. In that interim setting, the student demonstrated behaviors similar to those described by Putnam County. Tr. 96. His special education teacher, Cindy Nance, testified that when the student spent time in the regular classroom he exhibited many disruptive behaviors, including loud outbursts, finger biting, echolalia, talking and reciting. She stated the student's behaviors were severe and very much impeded his learning.

4. Cindy Nance remained the student's special education teacher through May 2004. Tr. 1631, 1679-80. Nance has a bachelor's degree in elementary and special education and a master's degree in special education and has 25 years of experience in special education. Tr. 1630. Prior to becoming the student's teacher, Nance had very limited experience with children with autism, but received training in autism in preparation for the student's transfer and received additional training after that. Tr. 1825-26.

5. Katie Alexander was the student's occupational therapist. Tr. 1674, 2989. Alexander was employed as an occupational therapist at the Sherwood Center from 2000 to 2003 where she provided occupational therapy services to children with autism. Tr. 3017. During that time, she also contracted with three rural school districts, including Lathrop, to provide occupational therapy to students. Tr. 3017-18. Alexander contracted with the Lathrop District from August of 2000 through the fall of 2002. Tr. 3018. At the time, she had a bachelor's degree in occupational therapy and had begun a master's program. Tr. 3018-19. Alexander was licensed by the state of Missouri to provide occupational therapy and was board certified. Tr. 3020.

6. On November 13, 2000, the student's IEP team convened to prepare an IEP. Ex. R-1. The present level of educational performance section of that IEP stated that the student was able to read words on a third grade level, but his academic functioning was at a readiness to first grade level. Ex. R-1 at 9. He could not tell time to the half-hour, give the value of coins or understand ordinal numbers. He was unable to add or subtract with carrying or borrowing. *Id.* He used spoken language and gestures with some signs as his primary mode of communication. *Id.* The present level also indicated that the student had some sensory and attentional issues. *Id.* at 10. Lathrop's IEP for November 2000 noted that the student's behaviors impede his learning and that they will be "addressed in IEP objectives." *Id.* at 8. The IEP then addressed the student's behavior in one goal, to "reduce noise making when he becomes frustrated to 35% each day for four out of five days, six out of eight weeks." *Id.* at 14. The district reported he met that goal. *Id.*

7. During the spring and fall of 2001, the student began to display incidents of behavior that were perceived as sexual. On October 11, 2001, district staff discussed with the student's mother the behaviors observed (that included a "humping" motion, the singing of a Spice Girls song, and the grabbing of his penis). Ex. R-2 at 114. Alexander testified that, during the 2001-02 school year, the behavior changed in that the student began to engage other people in the behavior. Tr. 3046-47. The student later displayed additional behaviors, that included talk about toes and saying "mmm" that staff believed were precursors to the more sexually overt behaviors. Tr. 1684-85. Alexander ultimately concluded that the behavior was an automatically reinforcing behavior and then began initiating strategies that would assist the student in replacing that behavior with appropriate behaviors. Tr. 3048, 3056. To do that, she used a cost response behavior modification procedure where the student would be given a set of potato chips and, when he engaged in the behavior, he would lose a chip. Tr. 1685, 3048. Based on her observations, that strategy did decrease the frequency of the student's sexual behaviors. Tr. 3049; *see also* Tr. 1686. Staff concluded that the sexual behaviors were observed mostly when the student was in the presence of younger women, with light-colored, long hair. Tr. 1686-88; *see also* Tr. 2743. The district's language therapist testified that these behaviors impeded the student's learning to some extent but he was able to learn. Tr. 2746.

8. On November 7, 2001, the student's IEP team convened to conduct the annual review of his IEP. Ex. R-2. The present level of the IEP noted the progress the student had made since the prior IEP was implemented. Ex. R-2 at 30-31. With respect to behaviors, the present level noted that the student had decreased noise making and was able to follow a request to stop. *Id.* The sexual behaviors were not mentioned. The present level also stated that the

team was going to begin a functional behavioral assessment. Ex. R-2 at 32. The November 2001 IEP contained goals and objectives with respect to telling time, money, math, measurement, reading comprehension, task completion, following directions in games with peers, language, self-help skills, and written expression. Ex. R-2 at 32-37.

9. Although the district reported that the student met the goal of reducing his noise making when frustrated to 35% of the time on four of five days and six out of eight weeks, (Ex. R-1 at 14), for the November 2001 IEP his placement remained the same, in the special education classroom for more than 60% of his time. Ex. R-1 at 19; Ex. R-2 at 38. While the IEP for November 2001 again indicated the student had behavior issues that impeded his learning, and he was still making noise when he became frustrated, that IEP contained no goals or objectives to further reduce that or any other behavior. Ex. R-2.

10. Less than one month after the November 2001 IEP meeting, on December 4, 2001, Alexander, Nance and the student's paraprofessional prepared a memorandum to document his sexual behaviors because of their stated concern that the behaviors might be the result of sexual abuse. Ex. P-15. In addition, staff made a hotline report with the Division of Family Services. Ex. P-15. DFS conducted an investigation that included an observation of the student at school and consultation with individuals knowledgeable about autism to see if the behaviors were typical of children with autism. Ex. P-16. Because of the conflicting opinions about whether the behavior was typical of autism, the investigator found no firm evidence of sexual abuse. Ex. P-16 at 130; *see also* Ex. P-19.

11. On January 28, 2002, the student's father wrote to the district's special education director, Dr. Ken Quick, indicating that he had been seeking an IEP meeting for the student since

before Christmas and was now demanding a meeting to discuss, among other things, a new behavior plan.[3] Ex. R-2 at 44. In that letter, the father asserted that the parents were very disappointed in the services their sons were receiving and alleged that school staff was physically abusing them and denying them a FAPE. *Id.*

12. On or about April 5, 2002, Quick wrote to the parents regarding an IEP meeting. Ex. R-2 at 55. In that letter, Quick expressed the District's desire to bring in a behavioral/autism specialist to consult with the IEP team. *Id.* Prior to that time, Alexander consulted informally with Marilyn Stubbs about the student's behaviors. Tr. 734, 847. The district contracted with Stubbs to consult with respect to the student's sexual behaviors and to assist in determining whether the behaviors were part of the student's autism or the result of possible sexual abuse. Tr. 398-99, 839, 841-3, 847. Stubbs was the Associate Director of and has been employed for twenty-five years at the Sherwood Center, an agency that specializes in persons with disabilities and autism in particular. Tr. 398-99, 732-33. She specialized in behavior intervention and worked primarily with families in their homes. Tr. 733. Stubbs has testified in two prior due process hearings on behalf of parents and as an expert in behavior and autism. Stephen Walker, the parents' attorney in this case, represented the parents in one of those hearings and presented

3 The district asserted in its brief, citing the testimony of Nance: "Between November 2001 and May 2002, when [the student's] IEP team convened to address ESY, [the father] did not request an IEP meeting to address the behaviors that had been communicated to the [parents]. Tr. 1718." Dist. Brief at 14, n. 19. That is obviously not true. When it did discuss the father's January 28, 2002, letter, the district also mischaracterized the contents by stating it "demanded an IEP meeting to discuss a behavior plan **that would** put restrictions on 'how the boys will be punished.'" *Id.* at 17, ¶44. The letter actually demanded an IEP meeting to discuss "a new behavior plan **and to** put restrictions on how the boys will be punished." Ex. R-2 at 44.

her as an expert witness. Tr. 839-40. Rand Hodgson, the advocate who worked for the parents in this case, recommends Stubbs as a consultant. Tr. 839, 1297.

13. Stubbs testified that children with autism can display behaviors that are not easily understood and an observer must look at the environment and context in which those behaviors are displayed. Tr. 734. To do so, Stubbs conducts a functional behavior assessment ("FBA"). Tr. 737. Stubbs was hired by the district to conduct an FBA of the student's sexual behaviors and to recommend strategies for staff to use in addressing those behaviors. Tr. 743-44, 775, 832. Stubbs has attended workshops and other training opportunities in the areas of autism, behavior management and functional behavioral assessment and also has provided training to others in those areas. Tr. 733, 836-37.

14. Stubbs began a functional assessment of the student's sexual behaviors in April 2002. Tr. 267-303, 1874-75. She first had the school staff describe the student's behaviors and provide other information regarding those behaviors. Tr. 737, 848-49, 862, 3055-56. She then observed the student to check the accuracy of the staff reports and to see if there was other information that staff had missed. Tr. 737, 742, 848-49, 862. Stubbs also spoke to the student's father at IEP meetings and asked him about the student's behaviors. Tr. 747. She was able to observe the sexual behaviors that had been described. Tr. 742, 851, 1691. She then requested the staff to take data to see when the behaviors were occurring and with whom. Tr. 862.

15. The data collection process was designed to acquire information about the antecedents of the behavior as well as the function. Tr. 738-39, 3054-55. The form listed the various sexual behaviors that had been observed, but contained a place to note any other behaviors that might be observed. Tr. 865. The form also listed the various people with whom

the student came into contact at school, the perceived functions of the behaviors, and the frequency and consequences of the behaviors. Tr. 865-66, 1875-76, 1882-83. The individual working with the student took and completed the form. Tr. 1874-75. If no behaviors were observed on a given day, the form remained blank. Tr. 866-68. After the data were collected, Stubbs reviewed the data sheets as part of her FBA. Tr. 869. Stubbs generally wants to view at least a week's worth of data, but reviewed approximately 8 weeks of data for the student's FBA. Tr. 737, 869, 873. Stubbs testified there was sufficient data on which to prepare an appropriate behavior plan. Tr. 874. Stubbs testified that her FBA was valid. Tr. 1010.

16. In preparing the behavior intervention plan that followed the FBA, Stubbs relied on the data. Tr. 874. In developing a behavior plan, Stubbs generally follows the typical scientific process by defining the problem, gathering information, creating a hypothesis regarding the function of the behavior if possible, and creating interventions. Tr. 875. Those interventions are designed to decrease the inappropriate behaviors and increase socially appropriate interactions. Tr. 875. She followed this process in this case. *Id.*

17. On or about April 9, 2002, the district provided the parents with an IEP conference notification for a meeting to be held on April 23, 2002 to consider extended school year (ESY) services and a behavior plan. Ex. R-2 at 56. The notice indicated that Stubbs, an autism and behavioral specialist, was invited. *Id.* The parents requested that the meeting be rescheduled and requested a diagnostic staffing meeting. Ex. R-2 at 57. On or about April 20, 2002, the parents took the student to Premier Therapy Services for a private speech-language evaluation. Ex. P-28; Tr. 2362-63. Based on the availability of the necessary participants, including the parents, the district rescheduled the IEP meeting for May 14, 2002, to consider

ESY, a behavior plan, and – at the parents' request – to hold a diagnostic staffing. Ex. R-2 at 58, 64, 65, 67-69.

18. On May 14, 2002, the IEP team convened and the following individuals were among those who participated: the student's father, Quick, Nance, Alexander, Stubbs and Hodgson. Ex. R-2 at 70. The team agreed that the student was eligible for ESY. Ex. R-2 at 33, 39, 70-76. The team discussed the components for the student's three-year reevaluation, to be conducted in the fall of 2002. Ex. R-2 at 74-75, 79, 82; Tr. 377, 1721, 1725. The team discussed the sexual behaviors of concern that the student had exhibited, but the hotline call was not discussed. Tr. 1722-23. The parents said they were aware of the behaviors that were discussed and had seen some of the behaviors at home. Tr. 876. Hodgson testified that the district staff were forthright about the student's behaviors and reported that a lot of his behaviors were greatly interfering with his progress. Tr. 1351-52. They described off task behaviors, perseverative talking, difficulty focusing and following directions, self stimulating behaviors such as hand flapping, and sexual behaviors. Tr. 1368-69.[4] Hodgson testified that he assumed

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4 The district complained in its federal court brief that Hodgson did not testify that the staff reported the student's behaviors were "greatly interfering with his progress." ¶168, n. 54. The transcript contains the following testimony by Rand Hodgson:

> I thought Cindy was very -- the team was very forthright. And I asked lots of questions about the behaviors, I did a lot speaking in the meeting -- as you can imagine. And they were very forthright with all the behaviors he was doing. And there were lots of behaviors and lots of things interfering. And **I don't think there was any doubt that we all believed this kiddo was bright and, yet, he wasn't performing at the levels he should be because the behavior was interfering drastically** -- not a little bit, it was more than significant, it was -- the behaviors were severe.

Tr. 1368 (emphasis added). Hodgson later testified, "certainly what I got from everyone was the interpretation that they were very much impeding his ability to access his education." Tr. 1432.

Stubbs, an autism expert, was brought in to help understand and deal with all the student's behaviors. Tr. 1369-70. Hodgson and the parents did not learn until the hearing, in 2004, that she was retained to help only with the student's behaviors that appeared to be sexual in nature, not the preexisting behaviors that also impeded his education. Tr. 1370-71.

19. During the 2002-03 school year, the student attended the Lathrop District as a sixth grade student. Ex. R-9 at 214. Nance continued as his special education teacher, Tr. 1733, Christi Foreman was his speech-language therapist, Tr. 1851, 2474, and Holly Bozarth became his occupational therapist. Tr. 1879-80. Alexander did not provide direct therapy services during the 2002-03 school year, but did participate in the student's reevaluation. Tr. 3067.

20. During the student's sixth and seventh grade years, Foreman provided him with 30 minutes per day of speech-language therapy. Tr. 2478-79. The therapy was always provided in a 1:1 setting. Tr. 2484. Once a week, Foreman would take the student out into the school building to practice the skills that had been worked on 1:1. Tr. 2485, 2493-95. Foreman testified that the student made progress on and mastered many of his goals and benchmarks. Tr. 2494-98. She stated that when she first began working with the student, he displayed varying eye contact and avoided a lot of communication. Tr. 2479. He also had lots of sexual behaviors. Tr. 2481. Foreman implemented strategies to reduce those behaviors. When she began using the strategy of "head down" that was suggested by Stubbs, Forman testified that intervention helped to reduce those behaviors and that by January 2003, those behaviors had significantly

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Hodgson's testimony was very consistent that he observed and the school staff reported that the student had severe behaviors that interfered with his educational progress. There was also a lot of other evidence that the student had significant behavioral problems as described in other parts of the decision.

diminished. Tr. 2482-83. When the student displayed behaviors during his therapy sessions, Foreman testified those behaviors only momentarily interfered with his ability to work on his goals and objectives. Tr. 2483. Foreman stated that when she first began working with the student, he was nonverbal most of the time and was exhibiting sexual behaviors and did not interact. Tr. 2562. After the two years that she worked with him, he still required cues, but was more interactive and enjoyed those interactions. Tr. 2562. Foreman testified she observed "lots of gains" in those two years. Tr. 2562-64.

21. For approximately the first seven weeks of the 2002-03 school year, the district was unable to find an occupational therapist to work with the student and did not provide the occupational therapy services called for in the student's IEP. Ex. P-34; Tr. 100-01, 341-42. Dr. Quick offered and by the time of the hearing provided compensatory occupational therapy services. Ex. P-34; Ex. P-39. There is no evidence to support the parents' broad statement that the student failed to receive OT services "during the years in question." Parents' Brief at 4.

22. The student's IEP team convened on August 29, 2002 and prepared a reevaluation plan. Ex. R-3 at 130, 132-33; Tr. 1440, 1729-30. The following were among those who participated: the student's father, Nance, Hodgson, Foreman, Stubbs, Alexander and Quick. Ex. R-3 at 132. The parent presented the district with a copy of the Premier Therapy Services evaluation from April 2002. Ex. R-3 at 182; Tr. 1730, 2362. On that date, the district presented and the parent provide his written consent to a notice of action proposing to conduct the district's reevaluation. Ex. R-3 at 133, Tr. 1732, 2502-03.

23. On September 10, 2002, Dr. William Breckenridge, an outside licensed psychologist, completed the cognitive and adaptive behavioral components of the student's

reevaluation. Ex. R-3. On the Leiter-R, the student obtained an IQ of 30. Ex. R-3 at 141, Tr. 3446. The Leiter is a standardized and validated IQ test that does not require verbal responses or an understanding of questions. Tr. 3446, 3450. Breckenridge's report stated, however, due to the student's distractibility, the IQ score might not be valid. Ex. R-3 at 141; Tr. 116, 120, 3447, 3457-59.

1. On October 16, 2002, the student's team convened to review the reevaluation results. Ex. R-8; P-36; Tr. 388, 1732-34, 1429-30. Among the participants were the student's father, Hodgson, Breckenridge, Stubbs, Nance, Foreman and Quick. Ex. R-8 at 201; Tr. 385, 388, 1372, 2499-00. The report that was prepared incorporated the results of testing by Alexander, Breckenridge, Krause, and school staff, and also included the conclusions from Stubbs' functional behavioral assessment. Ex. R-8; Ex. R-8 at 198-99; Tr. 788-89, 2110, 2348, 2414-15, 2500-02, 2505. The Vineland scales completed by Nance and the parents showed that the student was rated as significantly impaired by both. Ex. R-8; Tr. 1735-37, 2355-56.[5] The report also notes the IQ of 30 on the Leiter. Ex. R-8; Tr. 1737. The team did not diagnose the student as mentally retarded in spite of the IQ of 30 and the low adaptive behavior scores. Ex. R-8; Tr. 382.

1. The functional behavioral assessment showed that one of the antecedents to the sexual behaviors appeared to be younger women with light colored hair because he demonstrated higher rates of the targeted sexual behaviors with such individuals. Ex. R-8 at 198-99; Tr. 1877-78, 2349, 2360-61. After review of all information collected, the team concluded that the student

5 Hodgson testified, however, that he did not observe the student to function as low as rated by Nance and the parents. Tr. 1616.

continued to need special education and related services based on a diagnosis of educational autism. Ex. R-8 at 200-01; Tr. 1734. All team members signed in agreement with that conclusion. Ex. R-8 at 201; Tr. 388-89, 1738, 2505-06.

2. The student's IEP team convened on November 6 and 14, 2002, to prepare his annual IEP for the remainder of his sixth grade year. Ex. R-9 at 205; P-37. The following were among those who participated: the father, Hodgson, Stubbs, Quick, Nance, Alexander and Foreman. Ex. R-9 at 206. The present level described how the student's disability impacts his ability to access the general sixth grade curriculum. Ex. R-9 at 214. The present level also documented the progress he made on his prior IEP goals and incorporated information from the reevaluation. Ex. R-9 at 214-25. The present level further reflected the team's discussion of the student's Leiter IQ score of 30 and notes that the team did not believe that the score was representative of his daily performance or his capacity for learning. Ex. R-9 at 219; Tr. 122, 1737-38, 1748. The present level also noted the student's areas of strength but also described the behaviors that he was exhibiting. Ex. R-9 at 221-22, 225; Tr. 1749-50. The district for the first time included extensive descriptions of his behaviors in the section of the IEP containing his present levels of educational performance. Ex. R-9 at 221-22, 224-25. The IEP stated the student has "significant difficulties" with social conventions; difficulty starting and stopping activities when told to do so; "significant difficulty observing rules" regarding allowed versus restricted areas and objects, bathroom use, talking, and respecting others' property. He "demonstrates great difficulty with skills required for task behavior and completion," including listening, attending, remaining in his seat, staying on task. The student has difficulties with interactions with peers and adults, including sharing, waiting his turn, and modulating his voice.

He engages in "self-stimulating behaviors, such as hand flapping, jumping up and down, biting his left index finger . . . and reciting movies." "He may begin laughing at inappropriate times for no identifiable reason." The student "has trouble . . . avoiding provoking others, . . . using nonaggressive actions, using words rather than physical actions to respond when provoked or angry." He also presents a safety risk as he has difficulty keeping unsafe objects out of his mouth, . . . recognizing dangerous areas, . . . and checking for safety before crossing a traffic area." Ex. R-9 at 221-22. In addition, the IEP stated that the student's teacher, Nance, rated the student "as having very significant concerns in the areas of excessive withdrawal . . . and poor attention . . . [and] significant concerns in the area of . . . poor impulse control." *Id.* at 224-25. The IEP also described the student's inappropriate sexual behaviors and reported that district staff conducted a functional behavioral assessment only with respect to those types of behaviors, which included, using certain words that the staff believed were sexually suggestive, "touching his genitals, and caressing others' shoulders." *Id.* at 225. Stubbs testified that she did not do any detailed work to analyze or control the student's non-sexual behaviors because his classroom teacher said she thought they were being controlled in the classroom. Stubbs did not form her own opinion about whether those other behaviors interfered with the student's education.

3. The IEP contained goals and objectives or benchmarks in telling time, money skills, measuring, math calculation, reading, writing, language, work completion, peer interaction, sensory, motor and adaptive behavior. Ex. R-9 at 227-40. While the November 2002 IEP contained 27 annual goals, each with several short-term objectives, none of them related to decreasing the student's behaviors that are described in the present levels section of his IEP. *Id.*

4. The IEP also contained a list of accommodations and modifications including a modified spelling curriculum, social stories, visual cues, the use of PECS for language, frequent breaks, immediate and concrete reinforcements, the use of a private bathroom and modified assignments. Ex. R-9 at 226, Tr. 2515-16. Many of those accommodations and modifications constituted positive behavioral strategies. Tr. 2518-19.

5. The IEP also included a behavior management plan that was developed based on Stubbs' FBA, and a sensory diet that was developed by Alexander. Ex. R-9 at 208-13; Tr. 884, 887, 1766, 1771, 2508, 3080-81. The behavior plan was intended primarily to address the sexual behaviors that the student had exhibited, but the team believed it appropriate to include all the behaviors the student had exhibited. Tr.794-95, 883-87. Although the team was attempting to extinguish the sexual behaviors, the team was not intending to extinguish the off-task and finger biting behaviors that also were addressed. Tr. 1834-35.

6. The November 2002 IEP provided for a placement of 1375 minutes per week in special education with occupational and speech-language therapy. Ex. R-9 at 241; Tr. 3084. The student's placement did not change from his prior IEP and no notice of action was prepared. Tr. 1850. The student's time in regular education for art, music, P.E., lunch and recess also remained the same. Tr. 1851.

7. During the 2002-03 school year and based on the data collected, the student made progress on his IEP goals and objectives. Ex. R-9 at 227-240; Ex. R-10, 15. In November 2002, the district began providing the parents with daily behavior sheets that informed them about the student's behaviors and schedule. Ex. R-15; R-15A. These sheets were used to collect data with respect to the student's behavior and were sent home daily and signed by the parents. Reviewing

the IEP for the following year, November 2003, Stubbs testified she was unable to discern any indication that the behavior plan was working. *See* Ex. R-29. Stubbs testified that one of the purposes for reducing behaviors is to increase the child's time in regular education. Tr. 784-85. Yet between the November 2002 and the November 2003 IEP the student was actually spending less time in regular education. R-29 at 467; Tr. 786-87. The district asserted that the data showed that the student was exhibiting behaviors less frequently (District's Brief at 51), but both Stubbs and Nance testified that there was no improvement. Stubbs stated she was aware of no data showing success of the behavior plan. Tr. 787-88, 796-801. The November 2003 IEP present levels contain no behavior data. Tr. 804-07. And the student made no progress accessing the general education curriculum. Tr. 778-80. Stubbs agreed with the parents' attorney that the present levels section of the November 2003 showed no improvement in the student's behaviors and that she was unaware of any data that showed behavioral progress. Tr. 787-807. Stubbs also admitted that since the November 2003 IEP contained essentially the same behavior intervention plan after a year of no progress, that it was no longer appropriate to continue using it. Stubbs testified that she believed that Nance and Alexander had data regarding the frequency of the student's behaviors and that typically that kind of data would be included in an IEP or other reports, and the lack of that data makes the IEPs inappropriate. On examination by the school district's attorney, Stubbs stated that at one time the district was keeping data on the student's behaviors, but "at some point they quit using the charts and were making notations, just some general notations on notebook paper." Tr. 906. Stubbs also testified that in her opinion, the behavior plan was working and the student was improving. Tr. 907. There are no data or data summaries or reports that substantiate that opinion and the opinions of other staff that the

student's behaviors were improving. The district's documentation included behavior charts from November 2002 through May 2003, but no charts from May 2003 through the November 2003 IEP meeting. Ex. R-15 and R-15A at 304-397.[6] Nance also testified that during the first year that the behavior plan was in place, from November 2002 to November 2003, there was no change in the student's behaviors, she was still seeing them and at the same rate. Tr. 1765-66. The district prepared no analysis of the data reflected in the behavior charts that it kept from November 2002 through May 2003. The charts indicate a lot of inconsistency, some days indicating good focus and many days indicating very little on task behavior, such as 30 seconds or one to two minutes on task during a one-hour instructional period. Ex. R-15 and R-15A.

8. The district's brief is misleading in several respects with regard to the student's behavior. For example, the district stated: "The data that was collected showed that [the student's] behaviors of concern were decreasing. Tr. 857." Dist. Brief at 37 ¶97. The transcript at page 857, however, only contains Stubbs' testimony that she was told by other staff that his **sexual** behaviors were decreasing. The district also claimed that Nance did not observe progress with "sexual behaviors" during sixth grade. Dist. Brief at 38 ¶98. The transcript pages cited, however, contained Nance's clear testimony that she did not observe any progress with respect to **all of the student's behaviors.** Tr. 1733, 1765-66. Nance testified that over the four years

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6 The district pointed out in its federal court brief that the parents' evidence did contain additional behavior data. ¶262, n. 90. However, no one has analyzed those raw data and none of the witnesses testified as to what they show about the student's behavior after May 2003. Having the burden of proof or the burden of persuasion does not mean that the parents have to explain or analyze all the data. The hearing panel has to determine whether a preponderance of all the evidence supports the parents' claims. The panel majority believes the preponderance of the evidence shows that the student's behavioral problems did not improve. Among other evidence, Cindy Nance testified very clearly that his behaviors stayed the same from November 2002 through November 2003. Tr.1765-66.

she taught the student at Lathrop, through May 2004, some of his behaviors decreased, including his biting, hand flapping, and sexual behaviors, but his echolalia remained. The district did not point to any data that supported that testimony.

9. The district also relied on the testimony of its expert witness, Lisa Robbins, and claimed that she "testified that research shows that, for every year that a behavior has been in place, it takes three months of consistent implementation of a plan to see a significant decrease in that behavior. Tr. 3602-03." Dist. Brief at 38 ¶98. The district failed to point out that Robbins testified that she was not aware of such research regarding children with autism, and, perhaps more importantly, Robbins' testimony was not that it takes that long to make a "significant decrease" in behavior, but a "long-term" or "permanent" change in behavior. Tr. 3602-03. Robbins even clarified: "Now, that is not to say that you don't make some changes." *Id.*

10. During the 2002-03 and 2003-04 school years the relationship between the district and the parents became very strained. District staff complained about the father's behavior and he complained about their behavior. Staff filed police reports about the father and the parents filed formal complaints about the staff. There were disputes about access to records and whether the father was allowed to come on school property and the father asserted that due to medical conditions he was advised not to do so. The parents did not attend IEP meetings for the student, in the spring and fall of 2003. When the district later agreed to conduct IEP meetings at a neutral location, the father again attended. The panel will not attempt to sort out and decide all of those disputes or even provide detailed facts about them in this decision. The panel will note that the

parties were able to conduct themselves appropriately during 18 days of hearing, which was held at a neutral location.

11. During the 2003-04 school year, the student attended the Lathrop District as a seventh grader. Nance continued as his special education teacher, Foreman continued as his speech-language therapist. On or about November 11, 2003, the student's IEP team convened at school to prepare an IEP for the remainder of the 2003-04 school year. Ex. R-29. The following were among the individuals who were present and participated: Quick, Nance, PE teacher Joyce Slayden, Bozarth, Foreman, and Stubbs. Ex. R-29 at 460. The parents did not attend, but the team met without them, according to the district, because at least two attempts had been made to have them present. The present level of the IEP noted the progress that the student had made over the previous year. Ex. R-29 at 461-66. The district noted in its brief that the present level also indicates a decrease in the student's finger biting behavior, but it failed to point out that the next sentence states: "He has increased hand flapping and loud vocalizations when he becomes anxious." Ex. R-29 at 466. In the same paragraph, the IEP stated that the student "may run across the room and begin jumping when excited" and "[h]e frequently recites movies throughout his school day." *Id.* The IEP contained goals and objectives in the following areas: telling time, money skills, reading, measuring, writing, staying on task, language, adaptive skills, motor, and sensory integration. Ex. R-29 at 475-89. It contained no goals regarding decreasing inappropriate behaviors. The IEP also contained numerous accommodations and modifications, many of which constitute positive behavioral strategies to address the student's targeted behaviors. Ex. R-29 at 467; Tr. 1910, 2532-35. The IEP also contained a slightly revised behavior intervention plan as well as a sensory diet. Ex. R-29 at 469-74. The IEP did not

propose a change in placement, but a continued placement of 1375 minutes per week in special education, 60 minutes per week of occupational therapy, 150 minutes per week of language therapy. Ex. R-29 at 491.

12. One of the places where the district attempted to integrate the student was in PE. The PE teacher, Slayden, testified that he was able to participate in only about five percent or less of the PE curriculum. Slayden was excused early from the November 2003 IEP meeting, and could not recall whether she was present for discussion of the student's behaviors. She testified that she did not bring up at the IEP meetings the fact that the student was able to spend so little time in her class. Knowing that the student was not attending the full PE class, the district's response was to modify his attendance in PE, meaning he would only stay part of the time. Ex. R-29 at 467. As stated above, the behavior plan was not meeting the goal of allowing the student to spend more time in the regular education environment, but between the November 2002 and the November 2003 IEPs, the first year the behavior plan was in place, the student ended up spending less time in regular education.

13. During the 2003-04 school year, the student met and/or made some progress with respect to many of the IEP goals and objectives contained in November 2003 IEP. Ex. R-35 at 509-14; R-38 at 521-36; R-50 at 633-47. Although some of the district's witnesses testified that the student made some progress with respect to his behaviors during that year, the only data kept by the district on those behaviors was for April and May 2004. Tr. 1888; Ex. R-50 at 648-74.

14. On or about November 13, 2003, Quick corresponded with the parents regarding speech therapy services for the student, and acknowledged that there may have been some days during the prior three years when such services were not provided. Ex. R-31 at 497. Quick

indicated the district would provide all necessary compensatory services. *Id.*; *see also* Ex. R-30 at 496. The district determined that the student was owed a total of 32 hours of compensatory speech services. Ex. R-36 at 518; R-41. The district's review of records indicated the student missed 32 hours of speech services during the 2000-01 school year, over 11 hours during the 2001-02 school year, and five and one-half hours during the 2002-03 school year. Ex. R-41.

1. On or about March 19, 2004, the parents corresponded with Quick to inform him that a representative of Partners in Behavior Milestones (PBM) would be coming to the district on April 1 to observe the student. Ex. P-134. Quick initially replied that the observation was not necessary (Ex. R-37 at 519) but ultimately allowed the observation. On or about April 1, 2004, Dan Matthews from PBM observed the student at the Lathrop School District and prepared a report of his observation. Ex. P-139 at 511. The report was not presented to the District or to the student's IEP team. Tr. 1951-52, 3268, 3304. The report noted that Matthews observed for approximately 5 ½ hours which, as noted in the report, is a "relatively short amount of time to assess the conduct of any child." Ex. P-139 at 511. The report further noted that Matthews was present to assess only the behavioral component of the student's school day. *Id.* Matthews observed the student with Nance, but other children were removed from the setting because of the school's alleged privacy concerns. Ex. P-139 at 511; Tr. 1950-51. Matthews also observed the student in Foreman's therapy session, but that is not reflected in the report. Tr. 2549-50; *see* Ex. P-139. Matthews noted that the function of most of the student's behavior appeared to be for avoidance of non-preferred tasks, but further noted that the behaviors that he observed might serve different functions under different conditions. Ex. P-139 at 512. Matthews' report stated that Nance consistently refused to permit the student to escape and she provided a structured

academic routine for him. *Id.* He recommended changes in the program that he observed. *Id.* at 513.

1. Matthews did not testify at hearing, but Corey Royer, the owner of Partners in Behavioral Milestones, testified. Tr. 1029, 1031. Rand Hodgson, the student's advocate, contacted Royer about testifying. Tr. 1089. Hodgson and the student's father met with Royer one time at Royer's office about his involvement. Tr. 1144, 2920. Royer has a bachelor's and a master's degree in human development and dropped out of a doctorate program before he could complete that degree. Tr. 1030. Although Royer has a private practice as a behavioral analyst, Tr. 1030, he is not nationally certified in that area. Tr. 1030, 1091. Royer holds no licensures from any state in any area. Tr. 1092. Since 1997, since he founded PBM, Royer's primary job has been to help school districts manage behavioral issues with children with autism for whom most people are not able to succeed. Tr. 1031-32, 1034-35. He has worked with 1100 to 1200 different children and consulted with over 100 different school districts. Tr. 1031. PBM trains parents, teachers and other staff to manage noncompliance and decrease inappropriate behaviors. Tr. 1035. Many PBM employees have master's degrees and in the past others have had Ph.D.'s. Tr. 1032.

2. Royer testified that he had never met or observed the student, but that Matthews observed the student at Lathrop at his direction. Tr. 1036-38, 1066, 1109. In Royer's opinion, a behavior plan should never remain the same over an entire school year and an effective behavior plan should have a dual economy of reinforcement, one to reinforce the absence of inappropriate behaviors and the other for the production of work. The district's behavior plans were not appropriate without those dual economies. Tr. 1074. If the behavior plans were effective, they

would not still exist after two years. Tr. 1080. Royer testified that PBM has dealt successfully with the types of behaviors exhibited by the student in this case and has decreased such behaviors swiftly. Tr. 1081. In May 2004, PBM began the Milestones school for older children, aged 7-17. Four children began attending in May. Tr. 1093, 1100-01. Milestones was not in existence at the time that Matthews prepared his report. Tr. 1149. The school is approximately 40 minutes from Lathrop. Tr. 1093. The school for older children is a state approved private agency. Tr. 1033, 1094, 1102, 1189-90. PBM employs contracted occupational and speech-language therapists for those children who need those services. Tr. 1119. Royer testified that Milestones enrolls two types of children. The first are children with behavioral issues who are taken on a short-term basis and then reintegrated quickly into their public schools. Tr. 1102. In describing these children, Royer indicated that most have physically aggressive behaviors and he characterized them as the "toughest of the tough." Tr. 1097, 1102-03, 1197. Royer described the second group of students as those with autism. Tr. 1102. He testified that those students would be expected to stay at Milestones for a longer period of time because of the intricacies involved in teaching children with autism. Tr. 1102. Mr. Royer testified that, because of the short time that Milestones had been in existence, it was premature to discuss the average length of a student's stay. Tr. 1105. Royer also testified that Milestones has an application process and that the parents did not initiate that process with respect to the student. Tr. 1105, 1108-09. However, Mr. Matthews testified that he believed that PBM was an appropriate placement for the student. Tr. 1079. He acknowledged that the school was "pretty restrictive" and stated that PBM "imports" non-disabled peers for one or two hours every 2-3 weeks to interact with PBM students. Tr. 1130.

3. On or about May 13, 2004, the parents requested an IEP meeting to discuss placement. Ex. R-47. The request did not indicate that they were going to request PBM/Milestones as a placement and the district maintained it was unaware that that was the placement the parents were seeking prior to the meeting. Tr. 2331, 2962-63, 2975, 3270. On May 18, the IEP team convened at a neutral location to discuss placement and the meeting was civil. Ex. R-48 at 623-28; Ex. R-46; Tr. 1984-85, 1988, 2560, 2784-86, 3270. The student's father requested that the district place the student at PBM for the 2004-05 school year. No one from PBM attended the meeting and the parents did not share the Dan Matthews' report or request that any of Matthews' recommendations be implemented. Tr. 1121, 1964-65, 2560, 2949-50, 2961. At the meeting, the parent stated that PBM would not have occupational, physical or speech therapy services available. Ex. R-48; Tr. 3329-30. The team had no information about PBM other than what the parent provided. Tr. 2783, 3271. Moreover, at that time, the Milestones program was not in existence and limited information was, therefore, available. Tr. 3300. The parties disputed whether someone from the district, in particular its attorney, stated that PBM was too expensive. The district witnesses testified they analyzed the request by looking at least restrictive environment requirements and the continuum of placements. Ex. R-48 at 624-25; Tr. 3008-10. The team, excluding the parent, concluded that PBM was not the LRE for the student and rejected the parents' request. Ex. R-48 at 625-26; Tr. 2561, 3012, 3272, 3331-32.

4. On May 18, 2004, the district provided the parents with a written notice of action refusing the request to change the student's placement to PBM because PBM was too restrictive and the student would have no opportunity for integration and was making progress at Lathrop.

Ex. R-48 at 629. The notice also indicated that, per the parent's information, the student would have no opportunity for related services and the team further noted concerns regarding the length of time for transportation. Ex. R-48 at 629.

5. Over the strenuous objections of the parents, the hearing panel allowed Lisa Robbins to testify as an expert witness for the District. Robbins has a bachelor's degree in psychology and special education and a master's degree in special education with an emphasis in autism and Asperger's Syndrome. Tr. 3530. She also has taken courses towards a doctorate degree and has taken courses in autism and behavior beyond her degree programs. Tr. 3530, 3541-42. Robbins is certified by the State of Missouri to teach elementary education, special education, early childhood education and early childhood special education. Tr. 3530. Robbins is a full-time assistant professor at Missouri Western State College in St. Joseph, Missouri. Tr. 3529. In that position, Robbins teaches courses in early childhood education and early childhood special education, IDEA requirements and supervises student teachers in special education. Tr. 3529-30, 3551-52. She was employed as a special education teacher in a public school setting for approximately 16 years. Tr. 3530-32; *see also* Ex. R-53.

6. Robbins also has a private practice, Autism Supports Connection, Inc., in which she consults regarding autism, primarily with parents of children with autism but also with school districts. Tr. 3533-37. Robbins also is designated as a Missouri Autism Consultant by Project Access and received training from Penn State University in applied behavior analysis. Tr. 3537-41. Robbins also has received federal grants to write modules to train others on behavior, sensory integration and other areas related to autism. Tr. 3542. She also has published in the field of autism. Tr. 3544. She is the author of a book on Asperger syndrome and sensory

integration and has another book in the publication process. Tr. 3544-45. Robbins has consulted on autism issues on an international scale. Tr. 3545-46.

7. During the 2004-05 school year, the Lathrop District contracted with Robbins to be the district's autism consultant and she met and observed the student through that consultation. Tr. 3555-58. In preparation for her testimony, Robbins reviewed all of the district's evidence. Tr. 3558. Based on that review, Robbins testified that the student's autism affected him behaviorally, academically, socially, cognitively, and in communication in the school environment. Tr. 3566-70. Robbins described his IEPs at Lathrop as being a "Cadillac" model and representative of best practice. Tr. 3610-11. The present levels of those IEPs were excellent and were thorough, detailed and provided a clear picture of all areas of the student's functioning, his strengths and his areas of concern. Tr. 3596-97, 3610-11. Robbins testified that the present level met and exceeded IDEA requirements. Tr. 3596-97, 3610-11. In addition, she stated the goals and objectives in the IEPs were directly derived from the present levels and were age, developmentally and functionally appropriate, addressed all areas of concern and complied with IDEA requirements. Tr. 3597. She testified that the progress reports included within the district's evidence demonstrated that the student was making significant progress on his IEP goals and objectives. Tr. 3574-75, 3611. Robbins also testified that, due to his autism, it was not appropriate to expect the student to perform at grade level and she does not put much weight in an IQ score in developing an IEP program. Tr. 3578, 3585-87.

8. Robbins also testified about the student's behaviors and behavior plan. She testified that the sexual behaviors that he displayed were not typical of children with autism. Tr. 3579-81. She testified, however, that it is difficult to separate a behavior from autism. Tr.

3600. She testified the behavior plans were excellent and addressed the behaviors that were most significantly impairing his ability to function at school. Tr. 3601-02. Those plans looked specifically at what the behaviors were that were of concern and attempt to interpret why that behavior was occurring and provide responses to that. Tr. 3602. In addition, the behavior plans put preventative strategies in place to prevent a reoccurrence of the behaviors. Tr. 3602. She testified that the behavior plans and strategies included in the IEPs were appropriate and the sensory diets were exemplary. Tr. 3609.

9. Robbins also testified that, based on her knowledge of the student and PBM, PBM would not have been the least restrictive environment, but would have been a step backwards. Tr. 3613-14.

10. The parents presented several witnesses to testify that Robbins was not truthful in her dealings with other parents and about whether she had used the word "torture" in relation to behavioral therapy for children with autism in workshops she conducted at the Carl Junction School District. Robbins testified that she had described an intensive, at-home discrete trial program for young children with autism as "abusive" but denied she used the word "torture" in conjunction with the ABA methodology.

CONCLUSIONS OF LAW

The Burden of Persuasion and Reconsideration on Remand

As explained above, subsequent to the hearing panel's original decision in this case the United States Supreme Court held that in an administrative hearing under the IDEA, "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer v. Weast*, 546

U.S. 49, 58 (2005). In this case, therefore, the burden of persuasion is on the parents. As the Supreme Court explained, that will rarely make a difference in the outcome of a case. In the majority opinion, the Court stated, "very few cases will be in evidentiary equipoise." *Schaffer v. Weast*, 546 U.S. at 58. The dissent agreed. "[C]ases in which an administrative law judge (ALJ) finds the evidence in precise equipoise should be few and far between. *Schaffer v. Weast*,546 U.S. at 68 (Justice Ginsburg, dissenting). In this case, the majority of the hearing panel that ruled in favor of the parents on some issues, makes the same decision after reconsidering the evidence with the burden of persuasion upon the parents.

The panel has reconsidered the portions of the decision in which a majority ruled in favor of the parents in light of the change in the law regarding the burden of persuasion and in consideration of the arguments made by the school district in the federal court. Much of the argument in the district's federal court brief points out evidence that the district contends was overlooked or at least omitted from the panel majority's decision. The majority did consider all the evidence that was properly before it. Most of the evidence the district claims was ignored are details that were irrelevant to the majority's decision. This decision will address some of those alleged omissions below.

Applicable Legal Standards

Twenty five years ago the United States Supreme Court described the determination of whether a public entity has complied with the IDEA as involving a two-part analysis:

> First, has the State complied with the procedures set forth in the Act? And
>
> second, is the individualized educational program developed through the Act's

> procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted). The Supreme Court emphasized the importance of procedural compliance:

> It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, 458 U.S. at 205-06.

The case law under the IDEA requires that an educational program be set aside on procedural grounds in any one of three circumstances: (1) when the procedural inadequacies have "compromised the pupil's right to an appropriate education," (2) when the district's conduct has "seriously hampered the parent's opportunity to participate in the formulation process," or (3) when the procedural failure has resulted in "a deprivation of educational benefits."[7] *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996). Each of those three factors is stated by the courts as grounds for finding a procedural violation significant enough to require setting aside the educational program developed by the district. *Id.* As summarized by the Ninth Circuit, "'procedural inadequacies that result in the loss of educational opportunity,' **or** seriously infringe the parents' opportunity to participate in the IEP formulation process, **or** that 'caused a deprivation of educational benefits,' clearly result

7 Subsequent to the time period relevant to this case Congress amended the IDEA to codify those standards. 20 U.S.C. §1415(f)(3)(E)(ii) (2004).

in the denial of a FAPE." *Amanda J. v. Clark County Schl Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (citations omitted; emphasis added). Where a school district has "failed to develop the IEP according to the procedures required by the Act," the hearing panel "need not address the question of whether" the resulting IEP "was reasonably calculated to enable [the student] to receive educational benefits." *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). A school district's failure to develop an IEP "in accordance with the procedures mandated by the IDEA" may, "in and of itself" deny the student a free appropriate public education. *Amanda J., supra*, 267 F.3d at 895.

The panel will address the issues as they were presented in the parents' post-hearing brief. In considering the issues, the panel will apply the statute of limitations of two years prior to the request for due process.

I. Did the district deny FAPE by excluding and limiting parent participation in the development of goals and objectives and in making placement decisions?

As stated above, that issue was not specifically mentioned in the parents' written submissions prior to the hearing, but was first raised in the parents' opening statement. At that time, the attorney for the parents stated this issue was related to the issue of the district's failure to craft appropriately drafted IEPs resulting in a denial of FAPE. As discussed above, the panel will consider the issue in that context, whether the district excluded and limited parent participation and thereby led to inappropriately drafted IEPs.

Where a school district "blatantly violated one of the Act's procedural requirements, preventing full and effective parental participation," courts have condemned the district's violations as "driving a stake into the very heart of the Act," *Burlington v. Dept of Ed.*, 736 F.2d

773, 783 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985), and "undermin[ing] the very essence of the IDEA." *Amanda J., supra*, 267 F.3d at 892.

The 1997 amendments to the IDEA were intended to strengthen the participation of parents in the education of their children with disabilities. In the Congressional findings of the 1997 amendments, the IDEA states:

> (5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by -
>
> (B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

20 U.S.C. §1400(c)(5). The United States Department of Education reinforced Congress's emphasis on parental participation in the regulations it adopted in 1999 to enforce the IDEA. The ability to participate in meetings is an absolute parental right. 34 C.F.R. §300.501 states:

> *(a) General*. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.562-300.569, an opportunity to-
>
> * * *
>
> (2) Participate in meetings with respect to-
> (i) The identification, evaluation, and educational placement of the child; and
> (ii) The provision of FAPE to the child.

According to the parents in this case, the district violated their right of participation in several ways that the panel believes might be pertinent to this issue:

- rejecting the parents' request for placement at PBM without gathering additional information about the program;
- not accepting the father's statement that he could not attend meetings on school grounds;

- failing to schedule IEP meetings at a mutually convenient location;
- not believing the district had an obligation to disclose or share teachers' data with the parents or place it in the student's educational records.

This case is in an unusual posture because the parents did not allege a general denial of their right to participate prior to the hearing. The panel ruled that the issue would only be considered as it related to the issue regarding drafting of IEPs. The parents were allowed to and did participate in IEP meetings, except for the period during which the father was being treated for emotional issues and informed the district he could not go on the school grounds. When the father did attend IEP meetings, including with his advocate Rand Hodgson, they did not challenge the districts' development or drafting of IEP goals and objectives. There might have been a technical violation of the district's obligation to conduct IEP meetings at a mutually convenient place, but a panel majority does not believe that any limitation of the parents' right of participation, led to inappropriately drafted IEPs.

II. Were the IEPs for the school years 2002-03 and 2003-04 deficient?

In their post-hearing brief the parents contended the IEPs were deficient in that they failed to include information required by the IDEA and failed to address the student's particular needs arising from his disability, and that the district thereby failed to provide the student a free appropriate public education. Parents' Brief at 33-39. The parents rely on *Rowley* and its twofold inquiry quoted above, regarding procedural compliance and whether the IEP is reasonably calculated to provide educational benefit. *Rowley* also stated FAPE is tailored to the unique needs of the child by means of an IEP. The Court stated the IEP must contain a statement of present levels of educational performance, goals, objectives, and "appropriate objective

criteria and evaluation procedures" to determine whether objectives are being met, citing 1401(18) and (19). *Rowley* at 181-82.

Did the IEPs include an adequate statement of present levels of educational performance and baseline data, measurable goals and objectives, and appropriate objective criteria and evaluation procedures for determining progress?

The IDEA, 20 U.S.C. §1414(d)(1)(A)(I), requires that present levels of educational performance must include "how the child's disability affects the child's involvement and progress in the general curriculum." The parents argue "these critical pieces of information are missing from the IEPs challenged," and only with this information can measurable annual goals and short term objectives be developed to meet the child's unique needs. The parents rely on *Cleveland Heights-University Heights Sch. Dist. v. Boss*, 144 F.3d 391 (6th Cir. 1998), and *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir. 2003), for the proposition that the IEP requirements contained in the IDEA are not minor technical matters but minimum requirements for IEPs.

In *Cleveland Heights* the district argued that any deficiencies in the IEP "implicated only a few minor technical matters on a 'laundry list' of requirements that were insufficient in number and significance to constitute violations of the IDEA." 144 F.3d at 398. The court disagreed: "The items in section 1401(19) are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused." 144 F.3d at 398. The court affirmed that the IEP "did not provide appropriate objective criteria for measuring [the student's] progress," as required by the IDEA. 144 F.3d at 398. The court held: "In this case the violation

was far from technical, and its absence was not harmless. The omission went to the heart of the substance of the plan." 144 F.3d at 399.

In *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir. 2003), the court stated that the school district violated the IDEA's substantive requirements by failing to include in its IEP a statement of the student's "present educational levels and procedures for determining whether the instructional objectives had been achieved," *citing* 20 U.S.C. §1401(a)(20)(F) (requiring that an IEP contain "appropriate objective criteria and evaluation procedures and schedules for determining . . . whether instructional objectives are being achieved"). 317 F.3d at 1078 n6.

The parents argued the IEPs in this case were similar to those in *Cleveland Heights* and *Shapiro*. In *Cleveland Heights* the court described the offending IEP: "The IEP stated that Sommer's progress would be measured in terms of her ability to do things such as 'identify' a 'list of sight words . . . with 80% accuracy' and 'improve her reading fluency when reading a passage aloud 8/10 times.' Beyond such vague and general statements, the IEP offered no basis for measuring Sommer's progress." In *Shapiro*, however, the court did not specify the IEP deficiencies.

The district argued its position on this issue in its brief at 82-84. The district asserted that the IDEA and its regulations provide no further detailed requirements beyond the mandate that the IEP contain a "statement of measurable annual goals, including benchmarks or short-term objectives." Dist. Brief at 82-83. The district cited two district court decisions in which the courts rejected a similar argument, also made by Mr. Walker, the attorney who represents the parents in this case. *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 963 F.Supp. 1000

(D. Kan. 1997); *Logue v. Unified Sch. Dist. No. 512*, 959 F.Supp. 1338 (D. Kan. 1997). The district also relied on another case from the Sixth Circuit, the same court that decided *Cleveland Heights*. *Kuszewski v. Chippewa Valley Sch. Dist.*, 38 IDELR 63, 2003 U.S. App. LEXIS 536 (6th Cir. 2003) (unpublished opinion). In both of the district court cases, there are subsequent appellant decisions. *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692 (10th Cir. 1998); *Logue v. Unified Sch. Dist. No. 512*, 1998 U.S. App. LEXIS 16280 (10th Cir. 1998). While the school districts prevailed on the issue of the alleged deficiency of IEPs in each of the cases cited by the district, the cases do not state any general rules that apply to this case. They either held the goals and objectives under review complied with the legal requirements, or, if the IEPs were deficient, the deficiency was not of sufficient seriousness to warrant a finding of a violation of the IDEA. *See O'Toole*, 144 F.3d at 703-04.

The parents' primary challenge to the sufficiency of the IEPs in this case was that many of the goals and objectives were developed without actual data to establish a starting point or baseline for the skill. While the district correctly pointed out that the IDEA does not expressly require that such information be contained in an IEP, the law does require "a statement of the present levels of educational performance" and "measurable annual goals [and] objectives." 1414(d)(1)(A)(i) and (ii). Moreover, there must be a direct relationship between the present levels and the goals and objectives. *See, e.g., O'Toole*, 144 F.3d at 702. Therefore, while Congress did not expressly require that IEPs contain baseline data to support the starting point for each objective or benchmark, without such data there is no way to determine that the student actually made progress. If an objective states a student will perform a skill, and the student already knows that skill, mastering that objective would not show any progress. Through the

examination of many of the district's staff members at the hearing, the parents did establish that many goals and objectives in the student's IEPs were developed without baseline or starting point data. The IEPs were deficient to that extent. Because of other more serious IEP deficiencies as discussed below, the panel need not determine whether the lack of baseline data for some of the goals was significant enough to lead to a denial of a free appropriate public education.

Did the IEPs address the student's particular needs arising from his disability (particularly in the area of behaviors)?

The parents raised the issue whether the student's IEP goals were meaningful or meager – whether there were goals in the important areas of reading, social interaction, and behaviors. *See* Clarification of Issues #3,4,5. In that clarification, and throughout the hearing, the parents also challenged the behavior intervention plans developed by the district.

The parents cited *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003), to support its argument that despite some evidence of progress, a district violates IDEA when the progress was not truly meaningful. Parents' Brief at 36. The parents said the IEPs contained very meager goals and that the goals were compromised by the student's behaviors that were interfering with the student's academic and social/emotional progress and that the district first failed to address the behaviors and then addressed them inadequately. In *Neosho*, the issue was "whether the School District had provided the required behavior management plan necessary to ensure that Robert received a free appropriate public education." 315 F.3d at 1025. With respect to the arguments the school district made in this case, that the panel must examine the entire IEP for evidence of educational progress, the court noted that the *Neosho* case "is slightly

different in posture from others we have seen because it involves a **failure to implement a necessary provision of an otherwise appropriate IEP**." 315 F.3d at 1027 n.3 (emphasis added). Even though there was testimony in *Neosho* from teachers that the student "had attained some benefit academically," and "had progressed 'in a very broad sense,'" and from his mother that the student "made 'some' progress," the panel and reviewing courts agreed that those benefits were insignificant in light of the student's behavior problems that interfered with his education and made it impossible for him to remain in regular classes. 315 F.3d at 1029. The hearing panel in *Neosho*, credited the expert testimony presented by the parents that the student's "autism and resulting challenging behavior required the adoption of a formal behavior management plan," and that the goals and strategies contained in the student's IEPs "were insufficient." 315 F.3d at 1025-26.

Strawn v. Missouri State Board of Educ., 210 F.3d 954 (8th Cir. 2002), is another example of an Eighth Circuit case where although a disabled student was making some progress in many areas, the failure to properly address a key component of her educational need was held to constitute a denial of a free appropriate public education. Lauren Strawn had "multiple disabilities, including profound deafness, cerebral palsy, mental retardation, and spastic quadraparesis." 210 F.3d at 956. She was educated in the Missouri State Schools for the Severely Handicapped from 1985 to 1993, when a teacher who happened to know sign language discovered that Lauren "had shown 'sudden improvement.'" 210 F.3d at 956. The district court held that the State School had provided Lauren a free appropriate public education, based on evidence that during the time period covered by the applicable statute of limitations, the student "exhibited '**much progress in every area**.'" *Strawn v. Missouri State Bd. of Educ*., 30 IDELR

244, ¶18 (W.D. Mo. 1999), *rev'd*, 210 F.3d 954 (8th Cir. 2002) (emphasis added). Despite that evidence, the Eighth Circuit reversed and reinstated the hearing panel's decision that Lauren was denied a free appropriate public education because of the failure to provide her with appropriate services in an area of critical need: "The panel concluded that the education Lauren received at the Missouri State Schools for the Severely Handicapped with respect to sign language instruction was 'wholly deficient.'" 210 F.3d at 958. *Strawn* is further authority for the parents' argument in this case that even though the student made some progress on his IEP goals, the school district denied him a free appropriate public education because of the deficiencies in his behavior intervention plan.

The Lathrop school district relied on *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th Cir. 2003). In *CJN*, the student was making academic progress **and** the district was doing all it reasonably could to try to control the student's behavior. 323 F.3d at 638-39. The court noted that different behavioral interventions for the student, "did not appear necessary at the time to help him progress behaviorally." 323 F.3d at 639.

In this case, a majority of the panel finds that the student made progress in some areas, in math and in his language abilities in particular, but that the IEPs were deficient with respect to the student's behaviors, in several ways. A district court in the Eighth Circuit distinguished *CJN* on similar grounds. *Larson v. Indep. Sch. Dist. No. 361*, 40 IDELR 231, 2004 U.S. Dist. LEXIS 3322 (D. Minn. March 2004):

> The Court finds that Christopher's IEPs were not reasonably calculated to enable him to receive a meaningful educational benefit. The Court agrees with the School District that Christopher **has progressed and continues to progress at an average rate in his academics.** However, the Court finds that the case before it and *CJN* differ from one another in that the School District in *CJN* had conducted

> an FBA and an occupational therapy evaluation. Here, the School District did not conduct a proper FBA or prepare an appropriate BIF.[8]

40 IDELR at p. 970, 2004 U.S. Dist. LEXIS 3322 at *39.

There is no doubt that the student in this case had behavioral issues that impeded his educational progress. He could not succeed or even spend a significant amount of his time in the regular education environment because of his behaviors. That was known to Lathrop as soon as he transferred there from Putnam County in the fall of 2000. Putnam County's IEP says the student "is very noisy and disruptive;" he does not want to do any work; he "needs a very structured one on one intensive program; "[h]e should not be in a regular classroom until behaviors are under control;" "he is destructive;" when an item is taken away "he disrupts the classroom by screaming and making noises;" he "controls much of his environment by noise;" he will not participate in art. Ex. P-6 at 29.

The student's special education teacher, Cindy Nance, testified that when the student initially came to Lathrop he spent time in the regular classroom where he exhibited many disruptive behaviors, loud outbursts, finger biting, echolalia, talking and reciting. She stated the student's behaviors were severe and very much impeded his learning.

Lathrop's IEP for November 2000 noted that the student's behaviors impede his learning and that they will be "addressed in IEP objectives." The IEP then addressed the student's behavior in one goal, to "reduce noise making when he becomes frustrated to 35% each day for four out of five days, six out of eight weeks." Ex. R-1 at 14. The district reported he met that

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8 "FBA" refers to a functional behavioral assessment, and "BIF" appears to be a typographical error for "BIP" which is a behavior intervention plan. *See* 40 IDELR at 968, 2004 U.S. Dist. LEXIS 3322 at *31.

goal (*id.*), but for the following year his placement remained the same, in the special education classroom for more than 60% of his time. Ex. R-1 at 19; Ex. R-2 at 38. While the IEP for November 2001 again indicated the student had behavior issues, and one can assume he was still making noise when he became frustrated, that IEP contained no goals or objectives dealing with behavior. Ex. R-2. The IEP reported that the district would "conduct Functional Behavior Assessments on targeted behaviors." *Id.* at 32. Nance stated the team was concerned with the frequency of behaviors.

In January 2002 the parents requested an IEP meeting and a behavior plan. The district did not schedule the meeting until May 2002 and did not develop any behavior plan until November 2002. Rand Hodgson testified that at the first IEP meeting he attended, in May 2002, the district staff were forthright about the student's behaviors and reported that a lot of his behaviors were greatly interfering with his progress.[9] They described off task behaviors, perseverative talking, difficulty focusing and following directions, self stimulating behaviors such as hand flapping, and sexual behaviors. The district brought in Marilyn Stubbs, an autism expert, to help understand and deal with the student's behaviors. Although the parents were not informed of her limited role, Stubbs was retained primarily to help only with some of the student's behaviors that appeared to be sexual in nature, not the preexisting behaviors that also impeded his education.

In the student's November 2002 IEP, following a reevaluation of the student (Ex. R-8), the district for the first time included extensive descriptions of his behaviors in the section of the IEP containing his present levels of educational performance. Ex. R-9 at 221-22, 224-25. The

9 See fn. 4, above.

IEP stated the student has "significant difficulties" with social conventions; difficulty starting and stopping activities when told to do so; "significant difficulty observing rules" regarding allowed versus restricted areas and objects, bathroom use, talking, and respecting others' property. He "demonstrates great difficulty with skills required for task behavior and completion," including listening, attending, remaining in his seat, staying on task. The student has difficulties with interactions with peers and adults, including sharing, waiting his turn, and modulating his voice. He engages in "self-stimulating behaviors, such as hand flapping, jumping up and down, biting his left index finger . . . and reciting movies." "He may begin laughing at inappropriate times for no identifiable reason." The student "has trouble . . . avoiding provoking others, . . . using nonaggressive actions, using words rather than physical actions to respond when provoked or angry." He also presents a safety risk as he has difficulty keeping unsafe objects out of his mouth, . . . recognizing dangerous areas, . . . and checking for safety before crossing a traffic area." *Id.* at 221-22. In addition, the IEP states that the student's teacher, Cynthia Nance, rated the student "as having very significant concerns in the areas of excessive withdrawal . . . and poor attention . . . [and] significant concerns in the area of . . . poor impulse control." *Id.* at 224-25. The IEP also described the student's inappropriate sexual behaviors and reported that district staff conducted a functional behavioral assessment only with respect to those types of behaviors, which included, using certain words that the staff believed were sexually suggestive, "touching his genitals, and caressing others' shoulders."

In the November 2002 IEP the district for the first time included a behavior intervention plan. *Id.* at 208-09. The behavior plan addresses "sexually suggestive" behaviors, "off task" behaviors, and finger biting. While the November 2002 IEP contains 27 annual goals, each with

several short-term objectives, none of them relate to decreasing the student's behaviors that are described in the present levels section of his IEP.[10]

Id. at 227. Stubbs testified that she did not do any detailed work to analyze or control the student's non-sexual behaviors because his classroom teacher said she thought they were being controlled in the classroom. Stubbs did not form her own opinion about whether those other behaviors interfered with the student's education.

One of the places where the district attempted to integrate the student was in PE. Yet the PE teacher testified that he was able to participate in only about five percent or less of the PE curriculum. Knowing that the student was not attending the full PE class, the district's response was to modify his attendance, meaning he would only stay part of the time. Ex. R-29 at 467.

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10 The district argued in its federal court brief that the IDEA does not require goals for behavior, but only requires that the team consider positive behavioral supports and strategies. ¶100, n. 35. That is correct, but the student's IEP should document in some way that behaviors are being addressed, in goals, a behavior plan, or a statement in the present levels section of the document. Even though there was some testimony by witnesses for the district that the student's inappropriate behaviors were being addressed and declined, and that the student's behavioral and social skills were improving, the panel majority did not give much weight to the general statements of the witnesses called by the district that strategies were effective. They contradicted themselves when questioned closely about the IEPs and comparing one year's IEP to the next.

Reviewing the IEP for the following year, November 2003, Stubbs was unable to discern any indication that the behavior plan was working. *See* Ex. R-29. Stubbs testified that one of the purposes for reducing behaviors is to increase the child's time in regular education. Tr. 784-85. Yet between the November 2002 to the the November 2003 IEP the student was actually spending less time in regular education. R-29 at 467; Tr. 786-87. The district asserts that the data showed that the student was exhibiting behaviors less frequently (District's Brief at 51), but both Stubbs and Nance testified that there was no improvement. Stubbs stated she was aware of no data showing success of the behavior plan. Tr. 787-88, 796-801. The November 2003 IEP present levels contain no behavior data. Tr. 804-07. And the student made no progress accessing the general education curriculum. Tr. 778-80. Stubbs agreed with the parents' attorney that the present levels section of the November 2003 showed no improvement in the student's behaviors and that she was unaware of any data that showed behavioral progress. Tr. 787-807. Stubbs also admitted that since the November 2003 IEP contained essentially the same behavior intervention plan after a year of no progress, that it was no longer appropriate to continue using it. Stubbs testified that she believed that Cindy Nance and Katie Alexander had data regarding the frequency of the student's behaviors and that typically that kind of data would be included in an IEP or other reports, and the lack of that data makes the IEPs inappropriate. On examination by the school district's attorney, Stubbs stated that at one time the district was keeping data on the student's behaviors, but "at some point they quit using the charts and were making notations, just some general notations on notebook paper." Tr. 906. Stubbs testified that in her opinion, the behavior plan was working and the student was improving. Tr. 907. The district's documentation included behavior charts from November 2002 through May 2003, and the

parents' exhibits contained behavior charts from August 2003 through the November 2003 IEP meeting. Cindy Nance also testified that during the first year that the behavior plan was in place, from November 2002 to November 2003, there was no change in the student's behaviors, she was still seeing them and at the same rate. Tr. 1765-66. The district prepared no analysis of the data reflected in the behavior charts that it kept from November 2002 through May 2003. The charts indicate a lot of inconsistency, some days indicating good focus and many days indicating very little on task behavior, such as 30 seconds or one to two minutes on task during a one-hour instructional period.

In its federal court brief, the school district argued that the panel majority ignored testimony that the district was addressing the behaviors with various strategies and also failed to reference Ms. Nance's testimony that the student was able to make progress in spite of the behaviors. *E.g.*, ¶64, n. 20; ¶71, n. 23. The panel majority gave little or no weight to the generalized testimony of district witnesses, unsupported by documentation, that the district was addressing behaviors with strategies that were not mentioned in IEPs and that the student was making progress. As discussed above, the fact that the student was making some progress in some areas does not negate the conclusion that he was denied an appropriate education because of the district's failure to address appropriately his behavior. The student did make progress in some areas, but the panel majority believe the witnesses and documents showed that the district failed to do enough to address the student's behaviors to get them under control so they could make more progress in other areas. He had a significant behavior problem that was not sufficiently addressed. That was his main problem.

The school district also complained in its federal court brief (*e.g.* fn. 93), and the dissenting hearing officer also complained, that the panel majority relied on only small portions of the testimony of the district's witnesses. The district witnesses described what they did and testified generally that what they did was appropriate, all the decisions made by the school district were proper, and the student made progress. They also made significant admissions that contradicted their testimony of general compliance. In an IDEA case, deference to the opinions of the school district's witnesses is limited. "[T]he fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate." *County School Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 307 (4th Cir. 2005). The majority of the hearing panel considered all of the testimony of all of the witnesses but found that the general testimony of IDEA compliance by district witnesses was not persuasive for a number of reasons. They all had a bias in favor of the school district for which they either currently or formerly worked and a bias in support of the decisions made at meetings in which they participated. Their testimony in support of the district often seemed well prepared, if not rehearsed, and often went beyond their specific areas of expertise. On the other hand, the panel majority found that when the district witnesses admitted that certain aspects of the student's program were not appropriate, in response to detailed questioning by the parents' attorney, that those admissions were very significant even though they only took up a small portion of their testimony.[11]

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11 The panel majority is not saying that district staff are never entitled to respect and deference, but that they are not to be believed just because they are the district staff. The comments regarding witnesses being prepared relates to their general testimony that the IEPs were appropriate in general, even when they would not have the expertise to comment on every aspect of the IEPs. For example, Ken Quick, the district's special services director, had no background

The district also argued in its federal court brief that the panel majority should not have considered the amount of time the student was able to be integrated in the regular education environment, as opposed to his time in special education classes. That is one of the factors, but not the sole factor, that the majority relied on in deciding that the district failed to adequately address the student's behaviors. The district argued it is not relevant because the parents never requested an increase in the student's time in regular education. See district's federal court brief at ¶78, n. 26; ¶106, n. 37. The IDEA mandates that the school district "shall ensure – "

> (1) That to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and
> (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A). Regardless of what the parents requested, that provision of the IDEA, "reveals the strong congressional preference for mainstreaming." *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987).[12]

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or certification in special education, yet he was asked and gave his opinions about the severity of this student's autism, how his autism affected his education, and whether he really needed occupational therapy as a related service. An example of where a witness testified that the district's IEPs were deficient is at the end of Marilyn Stubbs' direct examination by Mr. Walker, when she admitted that developing social skills was an important need for the student but the IEPs did not adequately address that need so they were not appropriate.

12 The panel majority is not saying the district didn't document consideration of LRE, but that it's failure to increase the student's time in regular education is an indication that his behaviors were a problem. For example, one of the regular education environments they tried was PE. When it became clear that the student's behaviors were greatly interfering with his participation, instead of addressing those behaviors, the district took him out of PE, or reduced the amount of time he would spend there. The majority does not think it matters that the parent wasn't requesting more time in regular education. The parents wanted the district to get the student's behaviors under control so they could teach him what the parents thought were more relevant skills.

A majority of the panel therefore concludes, based on a clear preponderance of the evidence, that the student was denied a free appropriate public education due to the district's failure to adequately address his behaviors in his IEPs for the 2002-03 and 2003-04 school years, and that the district is incapable of providing the student a free appropriate public education.

Stubbs also testified that in May 2002 the IEP team agreed that social skills were the main concern or at least very important for the student. Tr. 832-33; Ex. R-2 at 74. She testified, however, that the IEPs of 11/02 and 11/03 did not sufficiently focus on social skills, and to that extent the IEPs were not appropriate. Tr. 833-35. That too is denial of a free appropriate public education for the student.

The IEPs created by the district might look good to an outside expert, such as the district's consultant and expert witness Lisa Robbins.[13] They have extensive present levels, many goals and objectives, and some efforts to address behavior; but the district did not really make a serious effort to address the student's behaviors, except the sexual behaviors, and the preponderance of the evidence establishes that the student did not make significant progress on his behaviors. The evidence from the IEP progress reports shows he made some progress in some areas, but they were not in the important areas for this student. There were no data regarding the frequency of behaviors, but Cindy Nance and Marilyn Stubbs both testified there

13 Although Robbins had the credentials to be qualified as an autism consultant and an expert witness, the majority of the hearing panel did not find her testimony to be credible or persuasive. Robbins appeared to the panel majority to support the school district's position that everything it did was correct, although she admitted on cross examination that she had limited bases for her opinions. Robbins also was opposed to the kind of intensive behavioral approach that the parents were seeking for their son. Witnesses testified that Robbins referred to such treatment as "torture." While Robbins denied that characterization, she admitted that she thought and said it was "abusive."

was no change in his behaviors during the 1st year that the behavior plan was in effect. Yet the district made no significant changes in the plan for the following year.

III. Are the parents are entitled to reimbursement?

The parents make a general legal argument about the right to reimbursement, but point to no evidence that the parents expended any funds on a private education for student. Thus, a panel majority believes they are not entitled to reimbursement.

IV. Did the district fail to provide proper prior written notice and did the district make decisions without including key people with knowledge, including the parents?

The parents do not specify which notices they complain about or how the alleged failure to give proper notice amounted to a loss of educational benefits or a denial of their right to participate. The issue regarding failure to allow participation was addressed above. A panel majority does not find a denial of a free appropriate public education on these issues.

DECISION

As stated above, a majority of the panel (Chackes and Allee) finds that the school district did not violate the IDEA with respect to the issues of parent participation and notice of action. A majority of the panel (Chackes and McClure) finds that the district violated the student's right to a free appropriate public education, both procedurally and substantively, in the development of the student's IEPs. As the parents did not expend funds for a private placement, a majority of the panel (Chackes and Allee) finds they are not entitled to reimbursement.

Having found a violation of the IDEA, the hearing panel has the same authority as courts, to "grant such relief as the court determines is appropriate." 20 U.S.C. §1415(i)(2)(B). As a

remedy for the district's violations of the IDEA, to provide the student a free appropriate public education, to provide compensatory education services to the student, and due to the animosity that has developed between the parties and the district's inability to provide the student a free appropriate public education, a majority of the panel (Chackes and McClure) orders the following remedy:

The district shall change the student's placement to a full time state approved private educational agency authorized to serve children of the student's age who are diagnosed with autism. The district and the parents shall attempt to agree on the appropriate placement, which might include PBM or the Sherwood Center, two agencies that were discussed in the evidence in this case. If, by April 15, 2008, the district and the parents disagree as to the appropriate private placement, and/or they later disagree about other aspects of the student's program during the 2007-08 school year, the summer of 2008, or the 2008-09 school year, they shall mutually agree upon a mediator, from the state's approved list of mediators, to help them resolve the disagreement. If the state will not pay for the mediator, it shall be at district expense. If, within three business days after such a disagreement arises, the parties are unable to agree upon a mediator, the school district shall provide to the parents the names of five mediators from the state's approved list who would be acceptable to the district. The parents shall then have two business days to select a mediator from that list. The parties shall meet with the mediator as soon as possible thereafter, and no longer than five business days following the selection of the mediator. If after meeting with the mediator the parties are unable to agree upon the appropriate private placement or other aspects of the student's program, the district shall proceed in accordance with this decision and the IDEA.

In order to compensate for the denial of a free appropriate public education, the district shall ensure that summer school services are made available to the student for the next four years, in all areas addressed by the student's then current IEP.

APPEAL PROCEDURE

This is the final decision of the Department of Elementary and Secondary Education in this matter. Either party has a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. The parties also have a right to file a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(i).

Dated: March 24, 2008

s/Kenneth M. Chackes
Kenneth M. Chackes
Chairperson

As to the above findings that the district did not violate the IDEA with respect to the issues of parent participation and notices of action, and that the parents are not entitled to reimbursement.

s/Terry Allee
Terry Allee
Panel Member

As to the above findings that the district did violate the IDEA with respect to the drafting of IEPs and as to the remedy:

s/Marilyn McClure
Marilyn McClure
Panel Member

Terry Allee and Marilyn McClure submitted dissenting opinions to the original panel decision issued in this case. They each stand by their original dissenting opinions explaining their disagreement with the majority decision authored by the Chairperson. Terry Allee also will submit an addendum to his dissent.

Copies of this decision will be delivered to the parties on March 17, 2008, by email and by certified mail, return receipt requested:

Stephen Walker
212 East State Road 73
Suite 122
Saratoga Springs, UT 84043

Mr.

Teri B. Goldman
Mickes Goldman, LLC
555 Maryville University Dr.
Suite 240
St. Louis, MO 63141

s/Kenneth M. Chackes
Kenneth M. Chackes
Chairperson

I have reexamined the evidence including the Original Final Decision, Modified Decision, Exhibits and Transcripts, read the Draft Remand Decision (DRD), the Final Remand Decision (FRD) and reconsidered the evidence under the new burden of proof standard set by the United States Supreme Court, which in this case holds the parents as the party responsible to prove that the District denied D.G. a Free Appropriate Public Education.

In footnote #4, page 16 the majority (Chackes and McClure) state:

1 The district complained in its federal court brief that Hodgson did not testify that the staff reported the student's behaviors were "greatly interfering with his progress." ¶168, n. 54. The transcript contains the following testimony by Rand Hodgson:

> I thought Cindy was very -- the team was very forthright. And I asked lots of questions about the behaviors, I did a lot speaking in the meeting -- as you can imagine. And they were very forthright with all the behaviors he was doing. And there were lots of behaviors and lots of things interfering. And **I don't think there was any doubt that we all believed this kiddo was bright and, yet, he wasn't performing at the levels he should be because the behavior was interfering drastically** -- not a little bit, it was more than significant, it was -- the behaviors were severe.

It appears to me that the footnote #4 on page 16 of the FRD has taken one statement by Mr. Hodgson's out of context and fails to include the rest of his testimony, including his cross-examination. This is why I feel that the original decision and the FRD are not based on the preponderance of evidence and that a great deal of testimony was not considered as I stated in my dissent. After further examination of Mr. Hodsgon's testimony, it appears to me to be contradictory and all over the place.

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In footnote #6 on page 24 of the FRD, the majority states:

"6 The district pointed out in its federal court brief that the parents' evidence did contain additional behavior data. ¶262, n. 90. However, no one has analyzed those raw data and

none of the witnesses testified as to what they show about the student's behavior after May 2003"

I believe there is testimony that documents that the district did analyze the daily behavior sheets, but even if that is not accurate, the parents as the party with the burden of proof, are required to prove this point.

In paragraph # 2 on page 35, the majority (Chackes and McClure) state:

"The panel has reconsidered the portions of the decision in which a majority ruled in favor of the parents in light of the change in the law regarding the burden of persuasion and in consideration of the arguments made by the school district in the federal court. Much of the argument in the district's federal court brief points out evidence that the district contends was overlooked or at least omitted from the panel majority's decision. The majority did consider all the evidence that was properly before it. Most of the evidence the district claims was ignored are details that were irrelevant to the majority's decision. This decision will address some of those alleged omissions below."

I have reexamined the evidence and believe that if one goes through the evidence line by line and uses a reasonable person standard, that they would believe that the evidence was relevant. I stated this several times in my dissent.

In footnote #10 on page 48, the majority (Chackes and McClure) state:

"The district argued in its federal court brief that the IDEA does not require goals for behavior, but only requires that the team consider positive behavioral supports and strategies. ¶100, n. 35. That is correct, but the student's IEP should document in some way that behaviors are being addressed, in goals, a behavior plan, or a statement in present levels section of the document."

I have reexamined the IEPs and as I stated in my original dissent, D.G.'s behaviors were addressed in many different ways during both years in question. The district witnesses who worked with D.G. on a regular basis testified that sometime the behaviors weren't significant or were a manifestation of his autism. When the IEPs are analyzed separately, I believe D.G.s behaviors are addressed in a variety of ways, including those that are a manifestation of his disability.

In the Special Considerations page of the 2001-02, 2002-03 and 2003-04 IEPs the District stated that the student had some behaviors that were impeding his learning, or the learning of others, and the IEP outlined in the accommodations and modifications sections various strategies and interventions to redirect the behaviors.

With the assistance of the District autism consultant, Ms. Marilyn Stubbs, the District conducted a functional behavior assessment (FBA) and developed a data collection process used to collect information regarding the student's targeted inappropriate behaviors. As a result of the FBA and data collected, the District incorporated a Behavior Intervention Plan (BIP) as a part of the student's 2002-03 and 2003-04 IEPs. Although not required, this was utilized during the entire 2002-03 and 2003-04 school years.

As I pointed out in my original dissent, a BIP is only required when there has been a change of placement as a result of a disciplinary change in placement. During the 2002-03 and 2003-04 school years the IEP team developed a BIP that addressed the student's current behaviors. According to testimony by Ms. Nance, Ms. Foreman, Ms. Alexander, Ms. Stubbs, and Ms. Robbins the student's inappropriate target behaviors declined.

The IEPs for both years contained not only a BIP, but a list of positive behavior strategies in the Accommodations and Modifications section of the IEP. Lathrop Special Education and Related Services staff all agreed that the behavior strategies were effective and the student's behavior and social skills were improving.

On page 50 of the FRD, the majority (Chackes and McClure) state:

"In its federal court brief, the school district argued that the panel majority ignored testimony that the district was addressing the behaviors with various strategies and also fails to reference Ms. Nance's testimony that the student was able to make progress in spite of the behaviors. E.g., ¶64, n. 20; ¶71, n. 23. The panel majority gave little or no weight to the generalized testimony of district witnesses, unsupported by documentation, that the district was addressing behaviors with strategies that were not mentioned in IEPs and that the student was making progress. As discussed above, the fact that the student was making some progress in some areas does not negate the conclusion that he was denied an appropriate education because of the district's failure to address appropriately his behavior."

The district was not required to prepare an analysis of the behaviors. They were required to provide the parents with progress reports on a quarterly basis. They met this requirement and even went beyond this requirement which I also pointed out in my dissent.

On page 51 and 52 of the FRD, the majority (Chackes and McClure) state:

"The school district also complained in its federal court brief (e.g. fn. 93), and the dissenting hearing officer also complained, that the panel majority relied on only small portions of the testimony of the district's witnesses. The district witnesses described what they did and testified generally that what they did was appropriate, all the decisions made by the school district were proper, and the student made progress. They also made significant admissions that contradicted their testimony of general compliance. In an IDEA case, deference to the opinions of the school district's witnesses is limited. "[T]he fact-finder is not required to conclude that an IEP is appropriate simply because a teacher or other professional testifies that the IEP is appropriate." County School Bd. of Henrico County v. Z.P., 399 F.3d 298, 307 (4th Cir. 2005). The majority of the hearing panel considered all of the testimony of all of the witnesses but found that the general testimony of IDEA compliance by district witnesses was not persuasive for a number of reasons. They all had a bias in favor of the school district for which they either currently or formerly worked and a bias in support of the decisions made at meetings in which they participated. Their testimony in support of the district often seemed well prepared, if not rehearsed, and often went beyond their specific areas of expertise. On the other hand, the panel majority found that when the district witnesses admitted that certain aspects of the student's program were not appropriate, in response to detailed questioning by the parents' attorney, that those admissions were very significant even though they only took up a small portion of their testimony."

I don't understand why the majority panel gave little weight to the generalized testimony of the district witnesses. It appears to me their testimony was not just generalized; it was specific and supported by progress reports and data.

As I stated in my original dissent, the testimony of Ms. Marilyn Stubbs, Ms. Cynthia Nance, Ms. Christi Foreman, Ms. Katie Alexander, and Ms. Lisa Robbins appears to have been ignored or discounted from the findings of fact and conclusions of law that provide overwhelming evidence that contradicts the conclusions and resulting decision. These are the people that worked with D.G. and court cases support that their testimony and observations are deserving of respect and deference. If an MD (medical doctor) tells me I have a condition, but my plumber offers a different opinion, I certainly would defer to the MD, who has the knowledge, expertise and experience in this area. I don't recall or can not find any testimony that suggests the district witnesses should not be given deference or that their testimony should be given little weight.

Ms. Nance, the student's Special Education teacher, not only is certified as a general education teacher, but has a Masters in Special Education, as well as twenty-five years of experience in Special Education.

Ms. Alexander, one of the student's Occupational Therapists, has a Bachelors degree in occupational therapy, and had begun a Masters Degree program. Ms. Alexander is licensed in the State of Missouri to provide Occupational Therapy, and is board certified. She has several years of extensive experience in working with students with autism.

Ms. Christi Foreman, one of the student's speech and language pathologists, has Bachelors and Masters Degrees in speech pathology. She also has her certificate of clinical competency from the American Speech and Hearing Association. This is the highest credential available through her professional organization. She had experience working with students with autism prior to working with the student.

Ms. Marilyn Stubbs, one of the District autism consultants, is the Associate Director of, and has been employed for twenty-five years at the Sherwood Center, a private not-for-profit agency that specializes in providing special education and related services to students with autism.

Ms. Lisa Robbins, who testified for the School District as an expert witness in this due process hearing, has a Bachelors degree in psychology and special education, and a Masters degree in special education with emphasis in autism. She is certified in elementary, special, early childhood, and early childhood special education. She is a full-time Assistant Professor at Missouri Western State College in St. Joseph Missouri. She was employed in special education in public settings for sixteen years. She has received training from Penn State University in Applied Behavior Analysis, and is a Missouri Autism Consultant through Project Access in Springfield Missouri. She has published in the field of autism, and has written a book on Aspergers Syndrome and has extensive experience working with parents and school districts.

Mr. Rand Hodgson and Mr. Cory Royer testified as expert witnesses for the parents.

Mr. Hodgson has no degrees, no teacher certification, nor does he have any credentials in special education, autism, or any related field. He has no teaching experience.

Mr. Royer has no degrees in education or special education, no certification in education or special education, no licensures for any state, and no public school teaching experience.

Mr. Hodgson observed the student outside of the school setting, and only once briefly at school; and Mr. Royer testified that he never had met or observed the student.

In addition you state that the district witnesses made significant admissions that contradicted their testimony. After reexamination of the evidence, I don't believe that the record supports that statement. The majority goes on to state that the district witnesses seemed prepared and/or rehearsed. I didn't know there was anything wrong with be prepared to testify. I really don't understand this statement regarding preparing witnesses.

Further, on this same page, you state that the district witnesses admitted that certain parts of the program were not appropriate in response to Mr. Walker's questions. I can't find where you see that in the record.

On page 52 the majority states:

"The district also argued in its federal court brief that the panel majority should not have considered the amount of time the student was able to be integrated in the regular education environment, as opposed to his time in special education classes. That is one of the factors, but not the sole factor, that the majority relied on in deciding that the district failed to adequately address the student's behaviors. The district argues it is not relevant because the parents never requested an increase in the student's time in regular education. See district's federal court brief at ¶78, n. 26; ¶106, n. 37. The IDEA mandates that the school district "shall ensure – "

> ***(1) That to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled; and***
>
> ***(2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.***

20 U.S.C. §1412(a)(5)(A). Regardless of what the parents requested, that provision of the IDEA, "reveals the strong congressional preference for mainstreaming." A.W. v. Northwest R-1 School District, 813 F.2d 158, 163 (8th Cir.), cert. denied, 484 U.S. 847 (1987)."

If the majority is referring to the examination of Least Restrictive Environment (LRE) for D.G.,

then this was documented in all of his IEPs in question and the parent did not request additional time in the regular classroom. In addition, LRE was not an issue raised in this hearing. It seemed contradictory to me to say the school district did not consider or provide the LRE for D.G. and then find that he needed to be placed in a private day program outside the school district.

In footnote #13, page 53 of the FRD the majority states:

"Although Robbins had the credentials to be qualified as an autism consultant and an expert witness, the majority of the hearing panel did not find her testimony to be credible or persuasive. Robbins appeared to the panel majority to support the school district's position that everything it did was correct, although she admitted on cross examination that she had limited bases for her opinions. Robbins also was opposed to the kind of intensive behavioral approach that the parents were seeking for their son. Witnesses testified that Robbins referred to such treatment as "torture." While Robbins denied that characterization, she admitted that she thought and said it was "abusive."

Although the panel majority finds that Lisa Robbins' is not credible, I don't find a reason for this statement. In addition, it appears that the testimony of uncredentialed witnesses is accepted as persuasive and credible, when the testimony of credentialed and experienced educators was not considered credible. It appears that Mr. Hodgson and Mr. Royer were taken at their word, even though much of their testimony appeared to be speculative, inaccurate or hearsay

After reading the FRD it doesn't appear any of the facts in this case has changed from the original decision. Based on my reexamination of both parties briefs, their challenges and my dissent I don't believe the factual findings in this FRD are based on the preponderance of the evidence.

I have reviewed the following documents and pleadings:

1. Parents' Memorandum of Law in Support of Their Motion for Judgment on the Administrative Record

2. Parents' Response to District's Motion for Judgment on the Administrative Record

3. Plaintiff Lathrop R-II School District/s Suggestions in Support of its Motion for Judgment on the Administrative Record or, in Alternative, for Summary Judgment

4. Plaintiff Lathrop R-II School District's and Counterclaim Defendants Lathrop R-II School District, Kenneth Quick and Chris Blackburn's Suggestions in Opposition to Parent's Motion for Judgment on the Administrative Record

5. Plaintiff Lathrop R-II School District's Reply Suggestions in Support of its Motion for Judgment on the Administrative Record or, in the Alternative, for Summary Judgment

6. Original Final Decision dated August 18, 2005

7. Modified Decision dated September 14, 2005

8. Exhibits presented during the 18 day Due Process Hearing

9. Transcripts

11. Dissenting Statements

12. Draft Remand Decision

13. Final Remand Decision dated March 17, 2008

Based on this review I have not changed my opinion regarding the issues addressed in the Final Decision of August 18, 2005, the Modified Decision of September 14, 2005, or the Final Remand Decision.

The District did not deny D.G. FAPE by excluding and limiting parent participation in IEP meetings. According to the evidence presented and testimony given the parents were provided the opportunity to participate. The various Meeting Notices document the District's efforts to provide the parents a mutually agreed time and place to meet. The parent(s) did participate in most of the IEP meeting.

The IEPs for the school years 2002-03 and 2003-04 met the procedural requirements of the IDEA and were individually crafted based upon D.G.s special education and related services needs. The present level of educational performance was very comprehensive and reflected all of the assessment data available for D.G. at the time of the IEP meeting. The goals and objectives were very extensive and reflected the needs identified in the present level and met all of the procedural requirement of the IDEA. The goals and objectives were measurable, had appropriate mastery criteria as well as appropriate evaluation procedures. D.G. IEPs were specially designed to meet his unique needs and provided him with more than meaning educational benefit as evidenced by the well documented progress he made for both years in question.

D.G.s IEP addressed all of his educational needs, including his social, emotional and behavior needs. The present level described D.G.s needs in these areas and the IEP addressed his social, emotional, and behavior needs through appropriate goals, objectives, numerous behavioral supports, language therapy, supplementary aids and supports, accommodations, social and behavior strategies, sensory integration and diets, a personal paraprofessional, autism consultants etc.

The parents are not entitled to reimbursement because D.G. was provided FAPE during both years in question.

The District did provide proper written notice and followed all the IDEA procedural requirements during both years in question.

Respectfully,

Dr. Terry D. Allee